

STATE OF MICHIGAN
COURT OF APPEALS

PROASSURANCE CORPORATION, a/k/a
PRONATIONAL INSURANCE
CORPORATION, f/k/a PICOM, as Subrogee and
Assignee of UNIVERSAL IMAGING, INC.,

Plaintiff-Appellant,

v

DR. PETER NEFCY, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 26, 2007

No. 272963
Oakland Circuit Court
LC No. 2006-073299-CZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

In this indemnification action, plaintiff appeals as of right the trial court's order denying plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (10), and granting summary disposition in favor of defendant under MCR 2.116(I)(2). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Universal Imaging, Inc., and defendant were party-defendants in a medical malpractice case brought by Sharon Smith and David Smith. Defendant was dismissed from that case with prejudice because the affidavit of merit filed by the Smiths only explained how Universal breached the applicable standard of care.

The Smiths' case proceeded to trial against Universal. Although the Smiths' complaint alleged both active and passive negligence by Universal, a special verdict form only asked the jury to decide if Universal was liable for the negligence of its agent, defendant. The jury returned a verdict against Universal. In lieu of pursuing its appellate rights, Universal entered into a posttrial settlement with the Smiths. Plaintiff, as subrogee and assignee for Universal, subsequently filed this action seeking common-law indemnification from defendant. The trial court denied plaintiff's motion for summary disposition and granted summary disposition in defendant's favor.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10). As this Court explained in *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002),

[w]hen deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). . . . Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers. *Id.* at 565; MCR 2.110(A). Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). [.]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Here, the trial court denied plaintiff's motion and instead granted summary disposition for defendant under MCR 2.116(I)(2), which provides:

If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

If the documentary evidence produced by the parties shows that there is no genuine issue of material fact, the court shall render a judgment without delay. MCR 2.116(I)(1); *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994).

“[T]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses.” *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002). But common-law indemnification does not apply where the underlying complaint alleges active, rather than passive, liability. *Id.*

In order to be entitled to common-law indemnification, plaintiff was required to prove that Universal was free from active fault in the Smiths' case.

“‘It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence. *Provencal v Parker*, 66 Mich App 431; 239 NW2d 623 (1976); *Indemnity Ins Co of North America v Otis Elevator Co*, 315 Mich 393; 24 NW2d 104 (1946); *Husted v Consumers Power Co*, 376 Mich 41; 135 NW2d 370 (1965); *Liberty Mutual Ins Co v Curtis Noll Corp*, 112 Mich App 182; 315 NW2d 890 (1982). If a party breaches a direct duty owed to another and this breach is the proximate cause of the other party's injury, that is active negligence. Where the active negligence is attributable solely to another and the liability arises by operation of law, that is passive negligence.’ 413 Mich 597-598.”

To determine whether the indemnitee was “actively” or “passively” negligent, the court examines the primary plaintiff’s complaint. “If [the] complaint alleges ‘active’ negligence, as opposed to derivative liability, the defendant is not entitled to common-law indemnity.” *Peeples v Detroit*, 99 Mich App 285, 293; 297 NW2d 839 (1980). *Swindlehurst v Resistance Welder Corp*, 110 Mich App 693, 698; 313 NW2d 191 (1981), *lv den* 414 Mich 895 (1982); *Reed, supra*, p 8. [*Feaster v Hous*, 137 Mich App 783, 787-788; 359 NW2d 219 (1984).]

However, a court is not exclusively limited to deciding if common-law indemnification is available based only on the underlying complaint. It should take into account all other evidence available to it when ruling on this issue in a motion for summary disposition. See *Peeples v Detroit*, 99 Mich App 285, 293; 297 NW2d 839 (1980).

There is no dispute that the Smiths’ complaint against Universal included allegations of both active and passive negligence. Plaintiff argues, however, that it is clear from the jury’s verdict that the jury found that defendant was Universal’s agent and that Universal was found to be only vicariously liable for defendant’s negligence, thus entitling it to common-law indemnification. We disagree.

Although the jury found that Universal was liable for defendant’s negligence, plaintiff has not established that the verdict proves that it was not actively at fault in some respect. “An indemnification action cannot lie where the plaintiff was even .01 percent actively at fault.” *St Luke’s Hosp v Giertz*, 458 Mich 448, 456; 581 NW2d 665 (1998). The jury in the Smiths’ case was not asked to decide if Universal was actively negligent in the special verdict and plaintiff has not shown that Universal was free of active negligence in that matter. Although a jury verdict generally establishes liability for wrongdoing compared to a settlement agreement, *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 228; 556 NW2d 180 (1996), the verdict in the Smiths’ case only established that the jury found defendant negligent as Universal’s agent. This alone is insufficient to entitle plaintiff to common-law indemnification. See *Shaffner v City of Riverview*, 154 Mich App 514, 521; 397 NW2d 835 (1986). Plaintiff has not adequately explained why the allegations against Universal for its active negligence were never addressed in that action or how those allegations were resolved.

Moreover, Universal entered into a settlement with the Smiths that resolved all claims against it, which includes the allegations of active negligence. In addition to relying on the allegations in a complaint to prove active fault, our Supreme Court in *St Luke’s Hosp, supra* at 456-457, held that where a party settles a complaint alleging both its active and passive negligence, it may not seek indemnification where the settling party did not first seek summary disposition regarding its active fault. Because the hospital in *St Luke’s Hosp* did not first obtain a ruling on summary disposition regarding its active fault before settling the case, there was no way to determine if the hospital settled that case because it believed it was actively at fault, only partially actively at fault, or not actively at fault at all.

Plaintiff relies on the special verdict form to conclusively prove that it was found free of active negligence in the Smiths’ case, like a ruling on summary disposition, as recognized in *St Luke’s Hosp*. However, we are not convinced that this proves Universal’s complete freedom from active negligence because the special verdict does not foreclose the possibility of active

negligence by Universal. Plaintiff has failed to show that Universal obtained a ruling in its favor in the underlying lawsuit that it was not actively negligent, such as in a motion for a directed verdict or summary disposition. As defendant points out, if Universal claimed that it could only be vicariously liable for defendant's actions, it should have moved to dismiss the Smiths' case for the same reason that defendant was dismissed from the case with prejudice. Universal apparently took steps to challenge the jury's verdict on appeal for this reason, but then settled the claim brought by the Smiths. On these facts, the trial court correctly held that plaintiff failed to affirmatively show that Universal was found to be free of active negligence in the underlying lawsuit. Therefore, plaintiff was not entitled to indemnification and the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood